

**From:** Geoffrey McCabe  
**To:** Microsoft ATR,microsoftcomments@doj.ca.gov@inetgw,...  
**Date:** 11/22/01 2:37am  
**Subject:** Please take care of this

Dear Madam or Sir:

Since you are still hearing on this case, this article says it better than I could:

OPINION:

Microsoft on Truth Serum - the Antitrust Settlement Examined

Contributed by Tom Nadeau  
osOpinion.com  
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The proposed Microsoft agreement looks good and feels good, but listen to how the definitions in the agreement would play out in real life, and

then the agreement doesn't sound very good for competing software companies or consumers.

The recent antitrust settlement between the U.S. Department of Justice and software monopolist Microsoft (Nasdaq: MSFT) has enough loopholes to sew a circus tent.

The settlement actually grants Microsoft extra legal powers beyond what it had before the trial.

Don't think so? Well, here is a simulated conversation that may convince you. This is what I believe a Microsoft official would say to a neutral examiner asking questions about the settlement agreement, if the software giant were under the influence of a truth-enhancing substance.

Microsoft on truth serum. Listen in.

Set You Free

Examiner: "Let us start with the definitions, shall we?"

Microsoft: "Of course. Words mean things, whatever we want them to mean."

Examiner: "A. Application Programming Interfaces (APIs)"

Microsoft: "APIs running on one operating system (.NET) and calling a different operating system (on your PC, remotely via the Web) are exempt from regulation."

Examiner: "B. Communications Protocol"

Microsoft: "Since the settlement exempts code to remotely administer Windows2000 Server and its successors, all our communication software will be embedded with pieces of this code. We will not have any Communications Protocols that can be regulated according to this definition."

Legal Loopholes

Examiner: "D. Covered OEMs"

Microsoft: "The 20 highest licensees? Does that mean licenses paid for, licenses delivered to customers, licenses committed to, or licenses actually registered by the end user?"

Examiner: "H. IHV (Independent Hardware Vendor)"

Microsoft: "The settlement says they're only 'independent' if they depend on us for Windows. Unless we already 'own' them, we don't have to give them anything."

Examiner: "I. ISV (Independent Software Vendor)"

Microsoft: "The settlement says they're only an 'independent' if they depend on us. But if they only sell software for non-Microsoft operating systems, we don't have to give them anything. They will never be able to make their non-Windows products interact with our Windows-only products."

Hidden Message

Examiner: "J. Microsoft Middleware"

Microsoft: "The settlement says it's only Middleware if it has a X.x version number. But we don't use version numbers any more. We use year numbers. So our Middleware is not regulated by this settlement."

Examiner: "K. Microsoft Middleware Product"

Microsoft: "The settlement calls it a 'middleware product' if it is embedded in the operating system.... But it's just 'middleware' if it is distributed separately. If it is distributed by a shell company controlled by Microsoft through stock ownership, then it's not 'middleware' because it is not distributed by Microsoft or a wholly owned subsidiary."

A.P.I. Arrogance

Examiner: "L. Microsoft Platform Software"

Microsoft: "We'll ship the APIs as a standalone product through a third-party company, or sitting on a Web server somewhere. But we don't have to divulge any details of the APIs because they won't have a version number."

So they're not 'middleware' -- and therefore are not covered by 'middleware' clauses. Since they are not part of Windows, they are also not a 'middleware product.' "

Examiner: "M. Non-Microsoft Middleware"

Microsoft: "Sure, like we wouldn't give away free copies of comparable 'Microsoft middleware' to put them out of business. Except that it's not 'Microsoft middleware' if it has no version number, so it would not be regulated by this settlement."

Examiner: "P. Operating System"

Microsoft: "If we ship the APIs separately -- on the Web -- then it says that Windows is not even an operating system! It's totally unregulated!"

More Monopoly

Examiner: "Q. Personal Computer"

Microsoft: "Right, only PCs are covered. They let us extend our monopoly into game boxes, TV, servers, handhelds, phones, PDAs, whatever."

Examiner: "R. Timely Manner"

Microsoft: "We have to deliver product info as soon as we ship to

150,000 beta testers per version. However, we no longer beta test with more than 148,000 testers per version."

Examiner: "U. Windows Operating System Product"

Microsoft: "Ha! Doesn't even cover DOS-based stuff. We can keep spreading that stuff around any way we want. Oh, and that last sentence... We can put anything we want to in Windows -- any code owned by anybody! Yes, Just give me that last sentence!"

Best For Last?

About that last sentence.

The slickest part of all is to put the definitions at the end of the document, where they legally overrule all that comes before, and to place the loosest definition of all at the very end of the document, slyly positioned to trump any preceding malarkey.

That last sentence ostensibly was inserted to protect Microsoft from having to ship code that it did not choose -- so that Microsoft would not have to ship a rival company's code, such as Java or Netscape, for example.

But Microsoft can choose to claim that a competitor's product *is* a Windows Operating System Product, because the last sentence says that the court grants Microsoft the "sole discretion" over "the software code" -- not just "the Microsoft software code" -- that Microsoft chooses.

Above the Law

While other companies may have their claim to software ownership reviewed by the courts, this "settlement" exempts Microsoft from such review -- immunizing Microsoft from copyright lawsuits.

This is a license to hoist the Jolly Roger and sail the seven seas, pirating any rival code that Microsoft chooses.

Peace,

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